UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Curran, Berger & Kludt, Employer	)	
-and-	)	Docket No. 01-RC-269805
United Auto Workers Local 2322, Union	)	

UNION'S OPPOSITION TO REQUEST FOR REVIEW

I. Introduction

The Board should promptly deny the Employer's Request for Review, as it raises no substantial issues warranting review.

Attempting to bootstrap from an exceptionally thin factual record, the Employer argues that the Board must disqualify the petitioner as the representative of the petitioned-for bargaining unit. Its theory is that the subject employees – paralegals at a law firm – would be represented by a labor organization that happens to represent employees at a small number of the firm's clients. However, the Employer practices immigration law, not labor or employment law, and the alleged overlaps hypothesized by the Employer are farfetched and apparently have never happened. Most critically, the Employer can offer no precedent supporting its arguments, nor can it marshal evidentiary support from the record it attempted to develop at hearing. The extant case law overwhelming rejects the Employer's position.

The Employer also asks the Board to overrule decades of long-settled law and expand the definition of confidential employee, even though such efforts have been consistently rejected over the decades by the Board.

Based on the weakness of the Employer's arguments, it would appear that the Employer is using this Request for Review, and the resulting automatic impoundment of ballots, to stall the union campaign, rather than raise bona fide issues before the Board, The Union therefore urges the Board to promptly deny the Employer's Request for Review, and allow employee choice to be heard through the counting of ballots.

II. Factual Overview

Curran, Berger & Kludt is a law firm in Northampton, Massachusetts. UAW Local 2322 has petitioned for a unit of 33 employees in the following unit:

> All full-time and regular part-time immigration specialists, administrative assistants, front office interns, senior administrators, writers, paralegals, senior paralegals, senior paralegals/team leaders, interns, and technical specialists, and excluding manager, guards, professional employees and supervisors as defined the Act

T. 10. In that unit, 14 employees are paralegals; there is one senior paralegal; and there is one senior paralegal/team leader. T. 116. The firm's practice is exclusively immigration law. T. 49. About two-thirds of the firm's work is business/employment immigration practice, and the rest is family immigration practice. T. 50. The Employer's work involves helping client employers and their foreign employees obtain work authorization. T. 50. CBK trains its paralegals on the legal duty of confidentiality, and Attorney Dan Berger of CBK felt the training was adequate. T. 87. None of the petitioned-for employees are involved in the labor-relations issues for CBK's employees. T. 99-100.

At CBK, a paralegal is a "point person" for an individual case. T. 54. The paralegal gathers information from clients, prepares immigration applications, and keeps the responsible attorney apprised of issues. T. 54. Paralegals do not give legal advice, but sometimes convey the legal advice from the firm's attorneys. T. 55. Paralegals are in frequent contact with the firm's clients, and gather information from clients as well. T. 57.

A common visa that the firm helps clients obtain is an H-1B visa. T. 59. This visa goes to non-immigrant foreign workers. T. 59. It is a visa obtained by professional employees, often in higher education. T. 59. Part of the visa application process is the creation of a Labor Condition Application, which is a certification that the Employer will pay a fair salary, treat the non-immigrant employee similarly to others in the workplace, and that there is no strike. T. 60. In a non-union workplace, this legally required notice is posted to employees (e.g., on a bulletin board), and in a unionized workplace, notice is given to the union. T. 60. This notice allows either employees and/or the union to file an objection with the U.S. Department of Labor. T. 61. Generally, CBK jointly represents the employee seeking the visa and the employer sponsoring that employee. T. 64.

Among numerous other organizations, CBK represents the University of Massachusetts, Amherst, and helps facilitate the acquisition of H-1B visas for its postdoctoral scholars. T. 65. The petitioner, UAW Local 2322, represents a bargaining unit of postdocs at UMass Amherst. T. 65. The Employer offered testimony that CBK paralegals "interact" with UAW Local 2322 representatives in this process, but this was only to provide the notice to the Union that is required by federal law. T. 67. Sometimes the notice is provided to the Union directly by the Employer, as in Employer Exhibit 4. It is currently done via email, though no examples were proffered as evidence. T. 88. Mr. Berger has had no case-related contact with the Union. T. 92.[1] The CBA for the postdocs does not mandate a wage rate, other than a minimum wage. T. 95.

[1] Mr. Berger noted that the Union represents workers at Mt. Holyoke College (housekeepers)and Providence Hospital (non-professionals), which are both clients of the firms and UAW Local 2322 represents workers, but CBK's work had nothing to do with the employees represented by the union. T. 93.

The postdocs at UMass have been unionized since 2012. T. 89. Because they are public employees, it would be illegal for them to strike. G.L. c. 150E, § 9A. There has never been a strike or attempted strike of postdocs. T. 32. Attorney Berger of CBK estimated that over that eight-year span that CBK has worked on about 35-40 H-1B visas for UMass postdocs, though there are more in the recent years than the earlier years. T. 90. Although the Union has been notified in each case, it has never once objected to a Labor Condition Application notice, though it has received many. T. 90. In Mr. Berger's 24-year career, he has provided immigration-related advice about a strike only on two occasions. T. 91-92.

In evidence are the bylaws of UAW Local 2322 and the Constitution of the national UAW union. The Employer did not adduce evidence about any part of the document, but in previous statements has flagged that the Local 2322 bylaws requires that "the membership shall . . . do all in its power to strengthen and promote the labor movement," Local 2322, Bylaw 4.4 (revision Feb. 28, 2019), and that the UAW constitution declares that "It shall be the duty of each member to . . . acquit her/himself as a loyal and devoted member of the International Union." Constitution of the United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Art. 41 § 32 (June 2018). There was no evidence about this "duty," and no evidence that the Union has ever once enforced this duty, never mind enforced it in circumstances relevant here. President Surkin has read perhaps 5% of the national constitution. T. 40. In any event, President Surkin was clear that she has never encouraged any member to disclose confidential information, nor has she asked an employee to act disloyally to their employer. T. 39. Local 2322 has never had any internal union trials against a union member for any reason. T. 39.

One CBK paralegal, Jonah Vorspan-Stein, is actually already an employee of both CBK and UMass Amherst. T. 108. Mr. Vorspan-Stein is a student in the UMass labor studies graduate program studying unions. T. 109. He works 30 hours per week as a senior paralegal at CBK, and then 10 hours per week under UMass Amherst while on an internship assigned to CBK. T. 109-10. In that 10-hour role, he is a member of a bargaining unit represented by UAW Local 2322, and is a member of the petitioning union. T. 110. He has never divulged any confidential information and does not believe his union membership has interfered with his work in any way. T. 111.[2]

By decision dated January 19, 2021, the Acting Regional Director unequivocally and forcefully denied the Employer's arguments, and he directed a mail ballot election. Pursuant to that order, ballots were mailed on January 29, 2021, and they are scheduled to be counted on February 22, 2021. The Employer's Request for Review was filed February 1, 2021, which pursuant to Board regulations will result in the impoundment of ballots. 29 CFR § 102.67(c) ("…if a request for review of a decision and direction of election is filed within 10 business days of that decision and has not been ruled upon or has been granted before the election is conducted, ballots whose validity might be affected by the Board's ruling on the request for review or decision on review shall be segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such ruling or decision") (emphasis added).

III. Legal Arguments

[2] The Employer claims it first learned of this at the hearing. RFR pg. 31. Such a claim is unsubstantiated by the facts. Perhaps the witness the Employer called was personally unaware, but it defies logic that the Employer was unaware of its own employment relationship and connection to UMass, given that this employee who is a member of Local 2322 held his membership by virtue of a UMass internship at CBK itself.

A. The so-called "conflicts" in the grievance arbitration process are run-of-the-mill "conflicts" that unions face constantly

The Employer's contention that its hypothesized conflict of interest implicates the duty of fair representation is utterly without merit. The Employer speculates about a possible conflict in the grievance and arbitration process, where an error by a CBK paralegal could lead to negative job implications for a postdoctoral employee at UMass Amherst.

The Employer can claim "[t]he conflict is irreconcilable" only by ignoring decades upon decades of labor law, including Supreme Court precedent. RFR pg. 16. And ignore precedent is just what it does, as its legal argument is devoid of citation to even a single case in support of its argument. The duty of fair representation doctrine is already well-adjusted to address the conflicting interests of employees the Union represents.

Take Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), which is one of the foundational cases concerning the duty of fair representation. In Huffman, the Court considered a seniority system agreed to by the UAW that advantaged one class of employees over another, so much so that it literally led to 275 employees losing their jobs. Id. at 332. In response, the Court shrugged, noting "The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." Id. at 338. The Court's point was not indifference, but the necessary recognition that a Union will always need to address the problem of conflicts between members.

Of course, labor unions are constantly confronted by the need to address competing interests of different members. Said differently, the Employer's claimed irreconcilable conflict is of the kind that in fact is constantly reconciled by unions. Employees within the same bargaining unit may face competing discipline, where one employee's innocence of workplace misconduct

depends on a finding of another's guilt. This is the kind of conflict that falls well within a union's ability to address, consistent with its duty of fair representation. See Considine v. Newspaper Agency Corp., 43 F.3d 1349, 1357 (10th Cir. 1994) ("Rank and file members of a labor union invariably have conflicting interests and thus form multiple, and at times competing, constituencies. Concessions and compromises are inevitable by-products of the bargaining process and any single bargaining decision may inure to the benefit of some members while potentially injuring others."); Humphrey v. Moore, 375 U.S. 335, 349 (1964) ("[W]e are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another.").

Indeed, the situation identified by the Employer (CBK paralegal makes an error that harms a different UAW member) is easily addressed. The Union can easily take to arbitration both cases (one case arguing no just-cause to discipline the paralegal, and other seeking relief against the employer for a late-processed visa). The case concerning the paralegal concerns ordinary just-cause principles, while the case concerning whether the employer breached the CBA depends only on whether the visa was late-processed, not why. Moreover, any legal position taken by the Union in one case would not be relevant in the other.

The only case the Employer cites in support of its argument is Bausch & Lomb Optical Co., 108 NLRB 1555, 1566 (1954), which is completely irrelevant. That case concerned a labor union that established its own optical business and then tried to represent employees of a rival optical business. The Board held that a union cannot be certified as the representative of employees of an employer with which it is in direct business competition. This is wholly unrelated to the doctrine of the duty of fair representation. The Employer's duty of fair

representation argument is notably devoid of any authority related to the doctrine it implicates. Simply put, where a union faced with competing interests of its members "walks a thin line in the grievance area," it can do so well within the confines of its duty of fair representation. Washington-Baltimore Newspaper Guild, 239 NLRB 1321, 1330 (1979). Indeed, "[c]onflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes." Humphrey, 375 U.S. at 349–50.

B. The Employer's assumptions about conflicts of interest at the bargaining table are unrealistic

The Employer further argues its employees should be stripped of their right to join a union of their own choosing based on frankly bizarre speculation about the Union's "ulterior" motives at the bargaining table.

There is nothing in the record before the Regional Director that relates to the issue. Nonetheless, the Employer worries that "[a]t the negotiating table, CBK will be left to wonder whether a proposal is solely for the benefit of CBK employees, or for the benefit of employees who work for CBK clients." RFR pg. 18. Its hypothetical example – poorly explained – appears to concern a conflicting demand from CBK employees who would want reasonable working hours and the UAW who would want CBK employees subjected to unreasonable working hours so they would be available to help in a hypothetical "emergency" on behalf of a UAW member. RFR pg. 19. It is simply a bizarre argument. The record shows that CBK in its practice handles very few cases on behalf of UAW members --- 35-40 over eight years,[3] but even if CBK's

[3] The Employer neglected to develop the record to contextualize these numbers, but common sense would indicate that his is a very small part of the firm's practice. In other words, the firm has four attorneys and there are 33 employees in the proposed unit, and it is beyond believable

practice exclusively served the UAW, is the Employer seriously suggesting that the Union would pursue bargaining proposals that would call for unfair workload on paralegals, just so the paralegals would remain available to help UAW members with their immigration work? Would CBK agree to the nowhere-defined-or-expressed proposals it claims here are faulty? Moreover, even if this somehow happened, is the contention that CBK employees would fail to understand this, and proceed to ratify a CBA with offending provisions anyway? Employer Exhibit 11, UAW Constitution Art. 19, sec. 3 (granting ratification power to affected unit members).

This is another argument section in which the Employer marshals no authority in support of its argument. Its only citation is to St. John's Hosp. & Health Ctr., 264 NLRB 990 (1982), in which the Board held that a union's business interest in operating a nurse registry and referral service conflicted with its duty to represent the nurses who would be potentially be operating through that same referral service. But here, UAW Local 2322 is not involved in any business activities whatsoever. Its activities as a union are singular and ordinary: representing employees for the purposes of collective bargaining.

In reliance on St. John's Hospital, the Employer postulates esoteric hypotheticals, such as that the Union "might demand that immigration petitions for its members receive priority, or they might be less willing to propose articles that make it more difficult or expensive for CBK to perform its immigration services." RFR pg. 19. First, why would the Union feel the need to demand priority for its members? There was no evidence that non-immigrant workers represented by the Union have faced any meaningful obstacles in obtaining necessary work authorizations, or that CBK as an employer has been dilatory or slow in providing legal

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that the approximately 5-10 UMass cases per year makes up a significant amount of the firm's practice.

representation. In other words, the Employer presents an unlikely problem for which there is no evidence, and no evidence that the Union seeks a solution to this non-existent problem. Second, so what if the Union did propose priority for its members? The Employer could agree to such a proposal, or not, and that is how collective bargaining works. The fact that a Union might come up with an unconventional bargaining proposal– though again, there is no evidence that the Union actually harbors such an agenda, nor any logical basis upon which to assert that it would – does not mean that there is a conflict of interest.

The irony is that CBK and the Union are fundamentally aligned on the ultimate goal, which is that deserving workers obtain the proper and necessary work authorization. CBK and the UAW are not at cross purposes on this issue.

C. There is no conflict regarding the right to strike

The Employer claims that a conflict exists because the Union's governing documents (like most unions) regulate the manner in which the union approves a strike. This argument should be rejected as well.

First, it is clear that the Employer's desire to protect its employees right to strike is made disingenuously. What the Employer is truly seeking to do is strip its employees of their right to join a union of their own choosing, not protect their members and their right to strike.

Second, there is nothing about the claimed conflict that is factually identified. Even assuming it is true that the Union might be hesitant to authorize a strike that might be detrimental to some members (and of course the Employer did not even try to offer any evidence of this whatsoever in the remarkably thin record it developed), what is so unusual about this? Take the UAW, which of courses represents auto assembly workers. When auto assembly workers go on strike, this can detrimentally affect other unionized employees in the supply chain (parts

manufacturers, transportation workers, sales employees), as their work slows or stops until the assembly workers end their strike. There is nothing unusual in this relationship.

Third, the Employer has again offered no case on point to support its argument.

D. The Union's Joint Council presents no conflict of interest

The Employer claims that CBK employees will be disadvantaged if the union "is constantly having to juggle the competition between their interests and the interests of CBK client employees." RFR pg. 22. This is more rhetoric lacking in factual support. Evidently, CBK wants the Board to believe that its employees will be constantly disciplined and constantly engaged in grievances and arbitration, such that the Union will be "constantly juggling" these interests. CBK's odd and disingenuous self-appraisal lacks any record support, in that the Employer did not seek to offer any evidence about the disciplinary process of its employees. Indeed, its only coherent hypothetical is about the discipline of a CBK employee who caused the "undue delay in processing an immigration visa," RFR pg. 22, but there was no evidence that this has ever even happened.

Second, while a CBK employee might be disciplined in a grievable manner some day, there are exceptionally low odds that the proposed conflict would even materialize. For example, the likelihood that the grievable offense would involve work for a client connected to the workplace the Union represents is less than 100% (e.g., disciplinary action could be based on bad attitude, poor attendance, or weak job performance). If discipline is based on work done for a client who happens to work for an employer where the Union is present, there is a less than 100% likelihood that it affects a union-represented member. Even if it does affect a union-represented member, it may be that the CBK employee's actions had no impact on the other union employee's employment, and even if so, whether it would be anything that the union could

address.[4] And, at the end of the day, even if a CBK employee botched the immigration legal work for an employee who is represented by the UAW, and if that botched work caused harm to the employee at work, and if that harm was something that the union would or could address, there is no reason that the Union cannot work on these issues consistent with its duty of fair representation, just like unions do all the time when it comes to representing members with conflicting interests, as noted above.

Given that the Employer has handled only 35-40 immigration matters related to UMass postdocs over eight years, the extremely unlikely[5] chance that its imagined hypothetical could actually arise does not disqualify the union from representing the employees. (There is also no guarantee that CBK will continue to represent UMass or any other particular client in the near future. That is the fundamental basis of legal work.)

Moreover, the Employer adduced no evidence that the Joint Council even plays a role in bargaining strategy. Given that unit members vote whether to ratify their own CBAs per the UAW Constitution, Article 19, section 3, it is unlikely, and even if the Joint Council plays some role in bargaining, CBK members retain the right to not ratify an unacceptable CBA.

E. The claim that the Regional Director applied an incorrect test is immaterial

The Employer claims that the Regional Director's decision held that a conflict is present only if there is "direct pecuniary gain." RFR pg. 25. The argument is of no import. All the Employer has done is raise factually ungrounded, untenable and unlikely hypotheticals, the

[4] Some immigration-related consequences are mandated by federal law, and are therefore not realistically addressable by the union representing the foreign worker.

[5] Based on the record, it is not possible to offer any strict mathematical basis for the argument (even estimated), since the Employer at hearing failed to offer any evidence on how large the UMass practice is compared to its overall work. Common sense indicates that the percentage must be low, based on the size of the firm, but in any event, the burden was the Employer's to show.

nature of which are always rejected by the Board. "The employer bears the burden of showing that such a conflict of interest exists, and that burden is a heavy one: There is a strong public policy favoring the free choice of a bargaining agent by employees. This choice is not lightly to be frustrated. There is a considerable burden on a nonconsenting employer, in such a situation as this, to come forward with a showing that danger of a conflict of interest interfering with the collective bargaining process is clear and present.") Garrison Nursing Home, 293 NLRB 122 (1989) (quotation omitted) (emphasis added).

Said differently, whether the Employer is right about its "pecuniary interest" argument will not change the result, because there is no conflict under any version or iteration of the argument.

F. The Employer misreads the UAW Constitution

The Employer cites to Article 6, section 10 of the UAW Constitution language that bars a "fully employed" UAW member from taking work at another UAW workplace. It is facially apparent that this has nothing to do with conflicts of interest. It is about preserving work opportunities for the greatest number of employees.

G. The Employer's contention that some employees are "confidential" is frivolous and the Board should reject it, just as it has over the decades

The Employer argues that the paralegals, senior paralegal and senior paralegal/team leader are "confidential" employees because they are privy to the labor-confidential information of some of the firm's employer clients. And yet, the Employer concedes that none of the petitioned-for employees are privy to confidential information related to the firm's own employees.

CBK claims that its paralegals "are the eyes and ears of the firm and have consistent contact with clients about their labor relations with UAW Local 2322." RFR pg. 31. The

statement is fanciful and false. Nothing in the record supports it: at hearing, CBK could identify only a handful of cases over the years that concerned postdoctoral scholars at UMass Amherst, and it identified literally zero cases in which the firm's work actually overlapped on matters actually handled by Local 2322. The entirety of the Employer's argument falls flat once its recognized that its supported by this flimsy factual misrepresentation.

In any event, in 1980, the Board rejected this exact argument. In Kleinberg, Kaplan, Wolff, Cohen & Burrows, 253 NLRB 450, 457 (1980), the Employer argued that "all of its clerical and support staff are confidential employees, arguing that its advice to employer-clients on labor matters involves it in deciding and effectuating labor relations policies of these employers." The Board decisively rejected the argument:

> We have carefully considered this argument, and have resolved to reiterate, in the context of law firms as employers, that confidential status requires 'that such persons work in a confidential capacity with someone who formulates, determines, and effectuates labor relations policies for their own employer, not some other employer.' [quoting Dun & Bradstreet, 240 NLRB 162 (1979)][6] As stated above, none of the petitioned-for employees satisfy this test and we therefore conclude that under Board precedent they are not confidential employees.

Id. at 457 (emphasis added). Therefore, because none of the petitioned-for CBK employees satisfy this test, the Board should reject the argument.[7]

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[6] Dun & Bradstreet, 240 NLRB 162, 163 (1979) ("Further, it is implicit in the rationale for finding a confidential status that such persons work in a confidential capacity with someone who formulates, determines, and effectuates labor relations policies for their own employer, not some other employer.") (emphasis added).

[7] The Employer has attempted to rely on a footnote in Foley, Hoag & Eliot, 229 NLRB 456 (1977) to argue this case should be differently decided. There is no merit to this. Not only was Kleinberg decided after Foley, Hoag, it specifically addressed the question at hand and rejected the same argument the employer makes here. Kleinberg notes that Foley, Hoag also practiced immigration law, and in that case the firm "alleg[ed] that the services it renders in these areas are entwined inextricably with the labor relations of its clients. We conclude that the Employer has failed to justify departure from the general principle that law firm employees will not be treated differently under the Act from comparable groups of employees." Kleinberg, 253 NLRB at 457, n. 3. The Board should similarly reject the argument.

H. The Employer's argument that the Union must be disqualified pursuant to a conflict of interest has been rejected by the Board

The Employer also argues that the Union is disqualified from representing CBK's employees because it represents some employees of the firm's clients. There is, of course, absolutely no NLRB authority supporting the Employer's view, and all existing authority squarely contradicts the Employer. The Board should therefore also reject the argument.

In 1979, the Board decided Dun & Bradstreet, 240 NLRB 162 (1979). In that case, the Union petitioned to represent a bargaining unit of credit reporters, who by virtue of their employment had access to extremely sensitive financial information. The Employer argued that:

> credit reporters who were union members would "be faced with an irreconcilable conflict of interest and division of loyalties" regarding their access to confidential business information relating to numerous other employers which could be of use to their own union as well as to other unions. Thus, firms would fear, even more than they do now, that information regarding their financial status or labor relations policies could fall into the hands of a labor organization.

Dun & Bradstreet, 240 NLRB at 162. The Board was nonplussed, squarely finding that:

> union membership is not incompatible with an employee's duty of loyalty to his or her employer, even when that duty involves a responsibility to maintain confidentiality. The Employer has offered no evidence regarding the supposed pressures Petitioner would place on credit reporters to divulge confidential information. Thus, the Employer's premise that unionized credit reporters would be more disposed than unrepresented employees to breach their obligation of confidentiality appears to be unwarranted.

Dun & Bradstreet, 240 NLRB at 163 (emphasis added). The Board applied Dun & Bradstreet in Kleinberg, Kaplan, Wolff, Cohen & Burrows, 253 NLRB 450, 457, n. 3 (1980). "We are not persuaded that employees of a law firm differ from other employees in a way that would justify carving out an exception to the principle that 'union membership is not incompatible with an employee's duty of loyalty owed to his or her employer, even when the duty involves a responsibility to maintain confidentiality.' Dun & Bradstreet, 240 NLRB 162 (1979)." Id. This

decision followed an earlier decision involving the same employer and category of employees, in which the employer argued:

> that confidentiality of information and sources is an absolute prerequisite in the compilation of credit reports, that unauthorized disclosures to third parties, including labor unions, would eliminate sources of information or discourage those sources from revealing that information on which commercial credit is based, and that the resulting doubt cast upon the value of the Employer's credit reports would tend to discourage the extension of credit, thereby obstructing the free flow of commerce. These arguments are predicated upon the Employer's assumption that loyalty to a union would cause credit reporters to violate their employer's rules respecting confidentiality and divulge "privileged" information to that union.
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> We find no merit in these arguments or in the assumption upon which they are based. The law has clearly rejected the notion that membership in a labor organization is in itself incompatible with the obligations of fidelity owed to an employer by its employees. To the contrary, employees placed in positions of trust by employers engaged in a wide variety of financial activities have exercised their fundamental rights guaranteed by the Act without raising the spectre of divided loyalty or compromised trust.

Dun & Bradstreet, Inc., 194 NLRB 9, 1–10 (1971) (emphases added).

And yet, here is CBK recycling the same arguments, notionally claiming that union membership would trigger some duty to the union (albeit one that is left undefined by the record)[8], which would then risk a breach of confidentiality. The argument is just as wrong today as it was 50 years ago. There are many unionized employees who must maintain strict confidentiality at work, such as health care, nuclear power, financial services, defense

[8] This alleged duty apparently has something to do with language in the governing documents of the local and international unions. However, the Employer did not adduce one shred of evidence as to what this language means, how the Union interprets it, or if the Union enforces it. At the Local level, there has never been a trial of a union member. To the extent that it seeks to argue that the governing documents would require or encourage union members to violate the law and provide confidential information to the union, or to not use their full efforts on a case, this must rejected as lacking any evidentiary foundation. Indeed, President Surkin was clear that she would not expect any member to breach confidentiality. Any assertion by the Employer about the nature of a union member's duty to the union would be nothing but a fanciful assumptions and fact-free extrapolation from those documents. This certainly does not justify stripping these employees of their Section 7 rights to join the union of their choice.

contractors, etc., and the universal understanding is that the fact of union representation does not curtail their duty of confidentiality, and the same holds true here. If employees entrusted with national security secrets, such as defense contractors, can still be trusted when unionized, so can paralegals at a law firm.

A nearly identical argument to CBK's was rejected by the Regional Director of Region 2 in 2003. In Kennedy, Schwartz & Cure, P.C., 2-RC-22718 (DDE, June 20, 2003) (attached to this brief), the UAW petitioned for two bargaining units at a private law firm. One unit included attorneys, and the second included non-professionals such as legal assistants (aka paralegals). The firm's clients included unions and union benefit funds, some of which were adverse to the petitioning UAW. The Employer argued that:

> due to the particular nature of its business, and the Petitioner's affiliation with the UAW, the Petitioner should be disqualified from representing its employees. The Employer cites to specific examples of conflicts between various labor organizations that are represented by the Employer and local union constituent members of the UAW, and also points to certain circumstances under which the potential for such conflicts may arise.

Even though the petitioned-for unit included actual attorneys, the Regional Director nonetheless squarely rejected the argument in a lengthy and well-reasoned opinion. See also Am. Arbitration Ass'n, 225 NLRB 291, 292 (1976) (in a case concerning the unionization of employees of a labor arbitration service, where the Employer raised similar arguments, "We are likewise unwilling to presume that union representation will in any way interfere with the Association employees' strict adherence to the highest principles of confidentiality and trust.").[9]

[9] When a law firm imposes a rule on employees requiring them to keep client information confidential, there is no doubt that the Board would find that such a rule does not interfere with Section 7 rights. See Newmark Grubb Knight Frank, 369 NLRB No. 121 (July 16, 2020) (employer lawfully maintained the following rule prohibiting the "Use or disclose any Confidential Information of or regarding the Company or its clients, business partners or staff"). Therefore, nothing in the Act or in the fact of union representation would preclude the Employer from maintaining and enforcing its existing rules about confidentiality.

There was nothing in record to suggest that a conflict of any kind has arisen in a case in which CBK has been involved, or would have. The Employer's "evidence" was nothing but an expression of far-fetched conjecture. The Union has never objected to the labor certifications, and any hypothetical disputes that could involve a non-immigrant worker would arise under the CBA, not immigration law, and the firm is not barely involved in that work, if at all. If a conflict of interest actually arose in some hypothetical circumstance (undefined), the Employer could simply disclose it to the client and move forward.

The Employer elicited evidence that part of the process of obtaining an H-1B visa is for the employer to notify either the relevant collective bargaining representative (or to relevant employees if there is no union), and notify them of the wage being paid and the job sought. This allows the union or anyone to make a complaint to the U.S. Department of Labor. The fact that the paralegal plays some role in providing this notice to the Union for UMass postdocs is immaterial. The notice provided is a public notice. Whether the Union would ever object (which has never happened) bears no relationship to the paralegal's role; that would be a function of the Union objecting based on a legally required public notice, and would have no connection to a paralegal's union status. This document is not confidential, nor is the information in it.

The record further suggests that the Employer's "concern" about the ethical rules and confidentiality are disingenuous. As Mr. Vorspan-Stein testified, the firm already employs an employee who – by virtue of his CBK internship – is a member of the very same UAW Local that has petitioned here. As CBK understood through its arrangement with UMass, given that it pays money to UMass to fund the paycheck that UMass issues, it was hiring a UAW member to work for its firm via a UMass internship. This never before presented a problem. It was only in response to the Union's organizing campaign, and the Employer's desire to avoid it, did the

ethical "concerns" surface. This should further convince the Board that the Employer's claims are not factually based (although the rather barren record should already have convinced it).

Indeed, this is not so much a legal argument, as an attack on the petitioned-for employees. The Employer's argument boils down to nothing more than a claim that its employees will succumb to some undefined loyalty to the union to violate serious confidentiality and/or other ethical rules.

The Union here does not dispute that there is a legal duty of confidentiality or diligence that paralegals must follow, by extension of the professional rules governing lawyers. The point is that there is absolutely nothing in the union membership arrangement that would compromise employees in the discharge of those legal duties. The Employer has done little to explain what legal conflict of interest might be realistically present, and it has failed to provide any facts in support. The Union acknowledges that there is no Section 7 right of employees to violate the employer's confidentiality rules, which the Employer may continue to maintain and enforce.[10]

Moreover, at issue in this hearing is whether the Board would certify the Union as the exclusive bargaining representative of employees if the Union wins the election. A certification does not create union membership. Union membership is an act undertaken by employees

[10] There was a suggestion that another concern might be that the paralegals might refuse to do work for a particular employer client with whom the Union has a labor dispute. For example, the fanciful notion that CBK paralegals would refuse to work on UMass matters if the Local wanted that. Of course, that would be a partial strike, and therefore unprotected. Vencare Ancillary Servs., Inc. v. NLRB, 352 F.3d 318, 322 (6th Cir. 2003) ("Partial strikes, where employees continue working on their own terms, are therefore unprotected by Section 7 of the Act. Employees, thus, may not "refuse to work on certain assigned tasks while accepting pay or while remaining on the employer's premises."). There is no basis to assume that employees would engage in obviously unprotected activity out of a sense of duty to the Union. Not only is that unrealistic on its face, but the Union is aware of no examples of that ever happening, either here or in the case law. To the extent that the Employer's claim is that employees will not put in their full effort at work out of a sense of divided loyalty, that is purely speculative.

voluntarily, and membership cannot be compelled. See Commc'ns Workers of Am. v. Beck, 487 U.S. 735 (1988). Moreover, employees have already pledged their support for the Union, in the form of the very organizing campaign now underway. In other words, even were the Employer's arguments accepted, the alleged "conflict" would remain following an RD decision, as that decision would not alter the "loyalty" employees would feel toward the union. The Employer's legal position is therefore all about union avoidance, and not about solving the alleged conflict of interest, which would remain.

Finally, the Employer's argument is statutorily barred by Section 7, which commands that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing…" 29 U.S.C. § 157 (emphasis added). Clearly, the Employer's position here would limit employees in the union they can choose to join. To the extent that the NLRA can constrain employee choice about which union they can join, it has done so statutorily, for example in § 9(b)(3), which does limit and shape employee rights to join guard unions. If Congress wanted to affect the right of law firm employees to unionize in these circumstances, it could have done so in the many previous decades.

IV. Conclusion

For the above-stated reasons, the Board should immediately deny the Employer's Request for Review so that the ballots may be counted on February 22, 2021.

Respectfully submitted,

UAW LOCAL 2322

By its attorney,

/s/ James A.W. Shaw
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Dated: February 8, 2021

CERTIFICATE OF SERVICE

I hereby certify that I emailed a copy of this document to Attorney Johan W.E. Maitland on February 8, 2021, by sending it to jmaitland@drm.com. It was also e-filed to the Regional Director on February 8, 2021, by sending it to Paul.Muprhy@nlrb.gov. The document was e-filed on the NLRB website on the same day.

/s/ James A.W. Shaw
James A.W. Shaw

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

KENNEDY, SCHWARTZ & CURE, P.C.

Employer

- and - Case No. 2-RC-22718

NATIONAL ORGANIZATION OF LEGAL SERVICES WORKERS (NOLSW), UAW, LOAL 2320, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before Audrey Eveillard, a hearing officer of the National Labor Relations Board. Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

The sole issue litigated at the hearing concerned whether the Petitioner should be disqualified from representing certain employees employed by the Employer. As discussed below, the Employer contends that the particular nature of its business operations creates an overlapping of jurisdictions among the Employer, its employees and the Petitioner, such that severe conflicts of interest would arise if the Employer's employees were to be represented by the Petitioner. The Petitioner, to the contrary, contends that the Employer's assertion of conflict is speculative and that the record fails to establish that the Petitioner should be disqualified to represent the employees of the Employer. As

discussed, and for the reasons set forth below, I have concluded that the Employer has failed to meet its burden to establish that the Petitioner should be disqualified. The record fails to demonstrate that there are either actual or potential conflicts of interest sufficient to deny employees of their statutory right to select whether or not they wish to be represented by the Petitioner.

Upon the entire record in this proceeding,[1] it is found that:

1. The Hearing Officer's rulings are free from prejudicial error and hereby are affirmed.[2]

2. The parties stipulated and I find that Kennedy Schwartz & Cure, P.C., the Employer herein, with its principal place of business located at 113 University Place, New York, New York, is a professional corporation engaged

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[1] The briefs, filed by Counsel to the Employer and the Petitioner, have been carefully considered.

[2] At the hearing, the Employer sought to present the testimony of an expert witness relating to the asserted conflict between membership in the Petitioner and the ethical rules governing attorney conduct. The Petitioner objected to such testimony, arguing that it was not relevant, and would be unduly speculative. The Hearing Officer sustained the Petitioner's objection and the Employer requested special permission to appeal her ruling. The Employer argued that the witness would testify that UAW representation would violate certain canons of ethics promulgated by the New York State Bar Association to regulate the conduct of attorneys. In particular, the Employer asserted that UAW membership would violate EC 5-13, governing attorneys' membership in labor organizations; EC 5-21, pertaining to the influence of third parties, DR 5-101(A) prohibiting personal conflicts of interest and Canon 9 prohibiting even the appearance of impropriety. In response, the Petitioner argued that these matters are enforced by the Bar and the courts and not by the NLRB; that the employer has failed to articulate any connection between the ethical responsibilities of attorneys and the asserted "competitive disadvantage" under which it would be placed should its employees become members of the Petitioner; that the Petitioner is not in direct competition with the Employer and that while the Employer is free to argue the ethical implications of union membership, the introduction of testimony regarding hypothetical future situations was not appropriate. The Acting Regional Director granted the Employer's request for special permission to appeal the Hearing Officer's ruling, but denied the appeal. The grounds for this ruling include the fact that, inasmuch as the Employer had failed to give the Petitioner notice of its intent to call an expert witness, a delay in the proceedings would be warranted to afford the Petitioner the opportunity to rebut such testimony. In view of the fact that the proffered testimony related solely to possible or hypothetical situations rather than any actual or imminent conflict, it was concluded that the probative value of such testimony was minimal, at best, and did not justify further delay of these proceedings. Although the testimony of the expert witness was not allowed, the Employer was not precluded from advancing those arguments relating to the applicability of the ethical rules governing attorney conduct to the instant case, and their arguments in this regard have been given due consideration.

primarily in the practice of labor law. Annually, in the course and conduct of its business operations, the Employer derives gross revenues in excess of $250,000, and purchases goods and supplies valued in excess of $5,000 directly from suppliers located outside the State of New York.

Accordingly, I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated and I find that National Organization of Legal Services Workers (NOLSW), Local 2320, UAW, AFL-CIO, the Petitioner, is a labor organization within the meaning of Section 2(5) of the Act.

4. The Employer contends that due to the particular nature of its business, and the Petitioner's affiliation with the UAW, the Petitioner should be disqualified from representing its employees. The Employer cites to specific examples of conflicts between various labor organizations that are represented by the Employer and local union constituent members of the UAW, and also points to certain circumstances under which the potential for such conflicts may arise. The Employer contends that these conflicts will have various repercussions, including an adverse effect on its clients, or potential clients, and will place it at a competitive disadvantage due to actual or perceived conflicts of interest, the potential for the Petitioner's representation of its employees to become an issue in internal union disputes among clients and the fact that its attorneys will be placed in an untenable position where they may be obliged to choose between the professional and ethical obligations owed to clients and the

duty of loyalty owed to the Petitioner. The Petitioner, to the contrary, argues that any potential adverse business impact upon the Employer is not a relevant consideration. The Petitioner also points to the fact that there already exist jurisdictional and other sorts of conflicts among labor organizations represented by the Employer and such conflicts do not disqualify the Employer from representing these clients. The Petitioner argues that there is no conflict of interest between the presence of a union representing associate attorneys and the presence of other union clients within a firm. Inasmuch as conflicts of interest may arise, these matters implicate the duties and responsibilities of attorneys, not the union seeking to represent them, and should be dealt with on a case-by-case basis.

The Employer's Operations

The Employer is a professional corporation engaged in the practice of law, employing approximately nine staff attorneys and seven non-professional clerical employees. Its client base consists primarily of labor organizations and union benefit funds, and includes unions representing public sector employees, employees of various not-for-profit agencies, garment industry employees, manufacturing and retail employees, transportation workers, electrical employees, public-sector university professors, medical interns and residents and attorneys. The Employer provides a wide range of legal services, including the design and implementation of union organizing campaigns, the negotiation of labor agreements, the prosecution of arbitrations, various types of litigation and the representation of unions in connection with internal union matters.

The Petitioner and its Affiliations

The Petitioner is one of many constituent local members of the United Automobile Aerospace and Agricultural Implement Workers of America (the UAW). The Petitioner represents approximately 3,000 legal workers, consisting of attorneys and paralegal specialists, in 30 states. According to the UAW's official web site, it represents employees in the automotive, aerospace and defense, and heavy truck, farm and heavy equipment industries. The UAW's membership additionally includes various technical, office and professional workers including telecommunications and news media employees, technical employees, graduate students, writers, artists and attorneys, as well as public-sector employees. Union dues paid by UAW members are apportioned, with 38% remaining with the local union, 30% going to a UAW strike fund and 32% going to the UAW International. In the event the strike fund retains over $500 million in assets, the local union and the International are each apportioned a higher percentage of employee dues.

The International body of the UAW has a Constitution, adopted in July 2002, setting forth the rights, duties and obligations of the Union and its members. Although the Employer generally points to the preamble and those sections outlining the obligations of members as being sources of potential conflict for employees, the Employer has cited no specific provision or obligation in support of this contention. The Constitution contains procedural protections for members charged with violating its provisions or engaging in conduct

unbecoming a member. Union decisions can also be appealed to an independent public review board.

The Employer additionally points to the fact that UAW members participating in a strike are eligible to be compensated from the International's strike fund.[3] The Employer also contends that the receipt of such compensation could create an ethical dilemma for the attorneys employed by the Employer. In this vein, the Employer additionally argues that employees might be asked to support UAW organizing drives involving rival union clients of the Employer. Other asserted areas of potential conflict are discussed below.

Asserted Conflicts between the Employer's Clients and the UAW

The Employer presented evidence of conflicts that have occurred between certain of its clients and UAW affiliates. For example, one of the labor organizations currently represented by the Employer, includes District Council 1707, Community and Social Agency Employees Union, AFSCME, AFL-CIO, Local 215 (DC 1707). The record establishes that on October 30, 2001, the Regional Director, Region 2 issued an Decision and Order Clarifying Unit in Case No. 2-UC-566. This matter involved a unit clarification petition, filed by UAW Local 2110, to clarify certain job classifications then represented by DC 1707 into an existing bargaining unit represented by Local 2110. Thus, DC 1707 was involved in litigation with this UAW local regarding the unit placement of certain employees. It is not clear from the record whether the Employer represented DC 1707 in connection with this litigation.

[3] The Petitioner does not maintain a strike fund.

The record also establishes that the Employer represents SEIU Local 1957, a union which was successfully involved in organizing interns and residents at Boston Medical Center. On behalf of this client, the Employer filed an amicus brief before the Board supporting the position taken by Local 1957 in connection with its organizing campaigns among graduate students at Columbia University and Brown University.[4] The Employer contends that, in the future, it is possible that the unions may take differing positions regarding the employee status of the other union's constituents.

The building where the Employer's offices are located is owned by a corporation that, in turn, is owned by one of the Employer's clients. As it happens, the Petitioner is one of several other tenants in that office building. According to Employer partner Thomas Murray, a dispute arose one recent summer due to problems with the air conditioning. The Petitioner was one of the tenants who complained to the owner about the situation. The Employer asserts that this landlord-tenant relationship is a continuing source of potential conflict between the Petitioner and its client.

The Employer currently represents the Professional Staff Congress, (PSC) which represents certain public-sector employees. According to Murray, at some point in the past, the PSC and the UAW both sought to represent a bargaining unit of employees employed by The Research Foundation, an organization which

[4] The brief was in support of the position that graduate teaching and research assistants are employees under the Act.

is affiliated with the City University of New York.[5] Julie Kushner, the New York Sub–Regional Director for the UAW Region 9A, testifying on behalf of the Petitioner, testified that this dispute did not involve the Petitioner. Kushner additionally testified that the UAW and the PSC have worked out an arrangement so as to avoid future disputes of this nature and to work cooperatively with one another to further the interests of the employees in question.

Asserted Areas of Potential Conflict

In addition to the above examples of disputes that have arisen between clients represented by the Employer and various UAW locals, Murray testified as to other potential areas of conflict as well. Murray stated that the potential impact of unionization upon the firm's representation of clients could become as issue in connection with internal union elections, or dissident movements within a union. According to Murray, a question could be raised as to whether the Employer is providing the best representation possible in the event its employees are represented by a union with whom a client is having, or may have, a dispute. By way of example, Murray pointed to the fact that client DC 1707 represents the support staff employees of the NAACP Legal Defense Fund. In the event the attorneys of the Defense Fund decided to organize, there would be potential competition between the Petitioner and the client relating to the representation of these attorneys.

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[5] Murray was not directly involved in this matter and, in fact, the Employer did not represent the PSC at the time of this litigation. As Murray recounted his understanding of the dispute, the case involved the question of whether the Employer was a public employer exempt from the Board's jurisdiction. If so, the PSC claimed that the employees in question should be accreted to an existing bargaining unit, rather than being separately organized by the UAW, who also claimed to represent the employees in question.

In addition, the Employer contends that its attorneys may be asked to give opinions as to whether to initiate unfair labor practice charges, or other legal proceedings, on behalf of labor organizations that may be competitors of the UAW. In such circumstances, it is contended, attorneys will be placed in the untenable position of violating the ethical duties owed to their clients and the duty of loyalty owed to their union and may have to act against their own personal interests insofar as any monetary obligations arising out of such charges or other proceedings would be satisfied by the dues of union members.

In its brief, the Employer additionally asserts that an attorney member of the bargaining unit would have an ethical obligation to reveal information about ongoing or potential organizing drives learned at union meetings to the Employer's clients. This would similarly subject the attorney to an intolerable conflict of interest. It is also urged that attorney affiliation with the UAW would, as far as ethical considerations are concerned, essentially place that union in the position of being the primary client of the Employer. As the Employer would not have the option of severing its affiliation with the UAW, it would have to cease representation of the client whose interests are adverse. [6]

On the issue of potential conflict, Murray conceded during cross-examination, that clients of the Employer could have, and actually have had, conflicts among themselves, and that the same questions of favoritism and conflict of interest could arise. By way of example, the Employer represents certain local unions affiliated with District Council 37 (DC 37), as well as the

[6] Other than a general reference to certain provisions of the Lawyer's Code of Professional Responsibility, discussed below, the Employer has cited no authority in support of the foregoing assertions.

Transport Workers Union Local 100 (Local 100). At one point, DC 37 and Local 100 were involved in a dispute with each other. In that situation, the Employer actually represented only one of the labor organizations in connection with the dispute. In this regard, Murray acknowledged that there is an organizational difference between local unions, mid-level bodies, such as district councils and umbrella organizations, such as international unions. In addition, Murray testified that union members may bring claims and law suits against their unions. On occasion, the Employer has represented such members and then has come to represent the union that has been sued.

The Code of Professional Responsibility

The Employer points to four sections of the New York State Bar Association's Lawyer's Code of Professional Responsibility which, it asserts, are implicated in the instant matter. EC 5-13 provides, in its entirety:

> A lawyer should not maintain membership in or be influenced by any organization of employees that undertakes to prescribe, direct, or suggest when or how to fulfill his or her professional obligations to a person or organization that employs the lawyer. Although it is not necessarily improper for a lawyer employed by a corporation or similar entity to be a member of an organization of employees, the lawyer should be vigilant to safeguard his or her fidelity as a lawyer to the employer, free from outside influence.

The Employer acknowledges that under this provision an attorney may belong to a labor organization, generally. The Employer asserts, however, that as a competitor and adversary of the Employer's clients, the UAW would have an interest in "prescribing, directing or suggesting" how the lawyer should act, and that the attorney would be subject to sanctions for failing to follow such prescriptions.

The Employer additionally points to EC 5-21,[7] and asserts that the UAW would be in a position to assert "strong economic, political and social pressures" upon the Employer's attorneys through (1) the imposition of sanctions; (2) the availability of strike benefits and (3) social and political pressure to be loyal to union brothers and sisters.

The Employer contends that an attorney's membership in the Petitioner would also contravene the provisions of DR 5-101(A),[8] which governs conflicts between the interests of lawyers and their clients. According to the Employer, this disciplinary rule would compel an attorney to share information about UAW politics, goals and strategies with clients and, conversely, inform the UAW about clients' organizational or bargaining plans should there be any actual or apparent conflict with the UAW's plans. The Employer additionally points to Canon 9, which provides that "[a] lawyer should avoid even the appearance of professional impropriety." The Employer asserts that membership in the UAW would create such an appearance.

The Petitioner notes that EC 5-13 allows attorneys to be members of unions. It further points to the fact that even assuming any collective-bargaining

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[7] EC 5-21: The obligation of a lawyer to exercise professional judgment solely on behalf of the client requires that he disregard the desires of others that might impair the lawyer's free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political or social pressure upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence. A lawyer subjected to outside pressures should make full disclosure of them to the client; and if the lawyer or the client believes that the effectiveness of the representation has or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of the client.

[8] DR 5-101(A): A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the lawyer's interests.

agreement negotiated were to contain a union security clause, the law does not permit a requirement that represented employees actually maintain membership in their union as long as they pay dues or the equivalent.[9] Ellen Wallace, President of the Petitioner, testified that there is no policy of Local 2320 to instruct an attorney member to take any particular position with respect to a client, and that this has not happened to her knowledge. She further testified that the Petitioner would not ask an attorney member to violate the canons of ethics governing attorney conduct. She also testified, however, that she has not studied these canons since being admitted to the bar. The Petitioner further points to the fact that the Employer's representation of clients with potentially adverse interests are also subject to the provisions of the Lawyer's Code of Professional Responsibility, in particular EC 5-14 through EC 5-20, and that such a potential exists in any law firm, and may also serve to create the appearance of impropriety in this context, as well.

Positions of the Parties

The Employer advances three arguments in support of its position that the Petitioner should be disqualified. First, the Employer argues that the Petitioner is in direct competition with the Employer's clients and therefore is disqualified from representing the employees of the Employer. The Employer additionally argues that the Employer's attorneys would have an intolerable conflict of interest caused by their dual loyalties to their clients and the Petitioner, as well as under the Lawyer's Code of Professional Responsibility. The Employer further contends

[9] *NLRB v. General Motors Corp*., 373 U.S. 734 (1963).

that the Employer's clients and the UAW has and will in the future likely seek the same bargaining units, causing a conflict of interest for employees.

The Petitioner contends that the Employer's assertions that unionization will place it at a competitive disadvantage are time-worn arguments which have been rejected by the Board and are not sufficient to disqualify the Petitioner. The Petitioner contends that an asserted or potential conflict between a union and an employer is not an appropriate ground for disqualification and that the focus must be on the union's ability to represent employees, not on any potential impact on the employer's business concerns. Similarly, possible conflicts of interest between the Petitioner and the Employer's clients are not related to the issue of whether the Petitioner will be a vigorous advocate for employees, and should be treated in a manner similar to those situations where the Employer represents various labor organizations who may have jurisdictional or other conflicts. Finally, the Petitioner contends that speculation about whether attorneys who are union members would be more or less likely to breach their ethical obligations is not related to the question of whether there is an innate danger that the Petitioner's alleged conflict of interest would interfere with the collective-bargaining process.

Analysis and Conclusions

Conflict of Interest

In support of its position that the Petitioner should be disqualified from representing the employees sought herein, the Employer relies primarily upon *Bausch & Lomb Optical Co.*, 108 NLRB 1555 (1954). In *Bausch & Lomb*, supra,

the petitioning union operated an optical business that was in direct competition with the employer whose employees it sought to represent in collective bargaining. The disqualification of the petitioner was based upon the latent danger that the union might bargain not for the benefit of unit employees, but for the protection and enhancement of its own business interests. In the instant case, the Employer claims neither that the Petitioner is in direct competition with it nor that the Petitioner would somehow be compromised in its ability to fully represent its employees. It asserts rather, that actual or perceived conflicts of interest between the Petitioner and its clients or on the part of its union-represented employees may have an adverse impact on the firm's client base, and thus, place the Employer at a competitive disadvantage. As the Employer argues in its brief:

> If the Petitioner were certified as the bargaining representative in the instant case, its role would be expanded beyond impact on so-called mandatory bargaining subjects, and it would be injected into matters infringing upon the interests of [the Employer's] labor union client. The presence of Petitioner would, of necessity, become part of any representation [the Employer] undertook on behalf of its clients.

The Employer further argues that "where the law firm represents union clients in direct competition with the petitioning union and the mandatory client disclosure must be made, the harm to the firm's ability to compete becomes manifest and disqualification of the Petitioner must be directed."

In *Garrsion Nursing Home*, 293 NLRB 122 (1989),[10] the Board restated the principles with respect to when a conflict of interest will preclude a union from representing employees in a given unit:

> The Board has long held that a union may not represent the employees of an employer if a conflict of interest exists on the part of the union such that good-faith collective bargaining between the union and the employer could be jeopardized. The employer bears the burden of showing that such a conflict of interest exists and that burden is a heavy one: 'There is a strong public policy favoring the free choice of a bargaining agent by employees. This choice is not lightly to be frustrated. There is a considerable burden on a nonconsenting employer, in such a situation as this, to come forward with a showing that danger of a conflict of interest interfering with the collective bargaining process is clear and present.' (citing *Quality Inn Waikiki*, 272 NLRB 1, 6 (1984)).

Based upon the record before me, I cannot conclude that *Bausch & Lomb* is controlling, as the Employer contends. As the Board has noted, "[t]raditionally, the Board has concerned itself only with those conflicts of interest which tend to impair a labor organization's ability to single-mindedly pursue its employees' best interests. Thus, the Board has, from time to time, refused to certify a union as a bargaining representative where the union's business or other involvement makes it potentially responsive to interests other than those of the employees whom it represents." *American Arbitration Association*, 225 NLRB 291 (1976). Moreover, as noted, the danger of conflict must be "clear and present." A plan to engage in an activity that might be competitive and even disqualifying is not sufficient. The plans must have materialized. *Alanis Airport Services*, 316 NLRB 1233 (1995); *IFS Virgin Island Food Service*, 215 NLRB 174 (1974).

[10] In this case, the Board found that disqualification was appropriate where a personal financial relationship was found to exist between executives of the union and the employer whose employees the union sought to represent.

As the Employer notes, the Board has held that the "principles underlying the conflict of interest doctrine are not limited to a factual situation where the employer and the union are in the same business." *St. Johns Hospital and Health Center*, 264 NLRB 990, 992 (1982). However, there must be evidence that a union's business activities interfere with its "single-minded purpose of protecting and advancing the interests of the employees who have selected it as their bargaining agent." *Bausch & Lomb*, supra at 1559. Thus, in *St. John's Hospital*, supra, relied upon by the Employer, the Board found the union to be disqualified where it operated a nurse registry service which relied, in significant part, upon recommendations from health care facilities including the employer, and had referred nurses to positions at the employer's hospital. The union conceded that it viewed the employer as a customer. In such an instance, the Board concluded that the relationship of the two entities was "something less than arms-length." 264 NLRB at 992.

The Board has not, however, been willing extend this rationale to situations where there is no conflict of interest directly implicating the petitioner's ability to "single-mindedly" represent employees. For example, the Board has held that investment of union pension funds in a competitor of the employer does not disqualify the petitioner from acting as bargaining representative. *David Buttrick Co*., 167 NLRB 438 (1967). The Board has also acknowledged the distinction between the interests of a local union and its international affiliate. For example, the Board has held that loans by a pension fund of the local union's international affiliate to a competitor of the employer did not disqualify the local

where it, and not the international, controlled dealings with the employer. *H.P. Hood & Sons*, 167 NLRB 437 (1967) and 182 NLRB 194 (1970).

In *American Arbitration Association*, supra, the petitioner sought to represent a unit consisting of tribunal administrators and clerical employees. The petitioner and the employer were not direct competitors of each other, but the employer argued, as does the Employer herein, that the petitioner should be disqualified because unionization of its employees would create various conflicts of interest. Both the petitioner, and the larger organization with which it was affiliated, were members of the employer, and eligible to sit on its board of directors. The employer also argued that union representation would create a conflict of interest among its employees in those arbitrations which involved the petitioner or other locals affiliated with the International. The employer contended that union membership might create a divided loyalty among employees which would cause them to breach their duty of fairly and impartially administering arbitrations. The Board rejected the contention that any asserted or potential conflict of interest between the petitioner and the employer would interfere with employees' sense of loyalty and fairness: "We are . . . unwilling to presume that union representation will in any way interfere with the Association employees' strict adherence to the highest principles of confidentiality and trust." 225 NLRB at 291. The Board additionally rejected a related argument, a corollary to one advanced by the Employer herein, that unionization might cause the public to perceive the employer as not being impartial and that such a perception would

encourage employers and unions from utilizing the employer's services, calling such an assertion "pure conjecture." Id.

Other cases relied upon by the Employer fail to support its contention that the rationale of *Bausch & Lomb* should be extended to cover the circumstances of the instant case. For example, in *Visiting Nurses Association, Inc. Serving Alameda County*, 254 NLRB 49 (1981), the Board found that the union was precluded from representing the employer's employees because the union operated and controlled a registry service which was in direct competition with the registry service operated by the employer. Similarly, in *Harlem River Consumers Cooperative, Inc*., 191 NLRB 314 (1971), the intervenor union's business agent had a substantial business interest in a company engaged in promoting and selling certain brand name products to retail outlets, including the employer. The Board held that, although this did not disqualify the union generally from representing employees, it was incompatible with its disinterested representation of the employer's employees. It was held that if the intervenor were to win the election, it should not be certified so long as its business agent remained in that capacity in the employer's geographical area. Thus, in both these cases the facts presented tangible conflicts of interest on the part of the unions that would jeopardize a good-faith collective bargaining relationship with the respective employers.

In *Kaplan, Sicking, Hessen, Sugarman, Rosenthal & Zientz*, 250 NLRB 483 (1980), the Board held that an employer violated Section 8(a)(1) and (2) of the Act when it recognized and bargained with a union as the collective-

bargaining representative of its employees when it also served as legal counsel to that union. The ALJ, affirmed by the Board, found that the law firm's role as labor counsel to the union provided it with the ability to influence the union in a broad range of matters, including the make-up of the union's officers, its financial dealings and the legality of its charter and by-laws. As the ALJ wrote:

> The Union sits across the bargaining table from its agent, and the Respondent sits across from its principal. The tendency of each to compromise its position based on the view that their agency or business relationship is more important than their separate interests is too great a risk to sanction when applying the Labor Act to their relationship.
>
> 250 NLRB at 490.

This case illustrates that the Board's concern lies with a union's ability to provide proper representation to employees, and not the potential to cause economic distress to the Employer. See also *Oregon Teamsters' Security Plan Office*, 119 NLRB 207, 211-12 (1957) (union not competent to bargain with itself concerning the terms of employment of its own employees).

The Employer's concerns regarding how the anticipation of potential conflicts of interest may result in possible consequences to its practice, does not pose the sort of conflict envisioned by *Bausch & Lomb*, supra, and its progeny, which consistently focus on the vigilance with which a petitioning union will enforce the collective-bargaining rights of employees. In the instant case, there is no evidence that the nature of the asserted conflicts between the Petitioner and the Employer's clients will result in any impediment to the Petitioner's ability to represent unit employees. Based upon the foregoing, I find that the Employer has failed to sustain the "considerable burden" it bears in establishing that there is a

"clear and present" danger that the collective bargaining process would be undermined should Petitioner be certified to represent its employees.

Ethical Considerations

The Employer relies upon both the evidence of past conflict and the inherent potential for future conflicts between the Petitioner and its labor union clients. The Employer points to the fact that attorneys may be placed in situations where the conflict between their union membership and their professional duties conflict, or create the appearance of impropriety. The Employer stresses that it is not contending that attorneys should not be represented by labor organizations but, argues rather that, due to the unique circumstances herein, this Petitioner, seeking to represent this particular group of employees, should be disqualified.[11]

In a variety of contexts, the Board has considered whether union representation of employees of law firms create such conflicts so as to deny them representational rights. By and large, the Board has concluded that the potential for such conflicts are not sufficient deny Section 7 rights to such statutory employees.

In *Lumbermen's Mutual Casualty Co. of Chicago*, 75 NLRB 1132 (1948), the petitioner sought a unit consisting, in part, of attorneys employed by the

[11] The Employer additionally urges the Board to adopt a rule requiring that unions seeking to represent lawyers and clerical employees in law firms not be affiliated with any labor organization that has a real and present danger of being in organizational and representational conflicts with clients of the firm. In support of this argument, the Employer points to other limits on union representation, in particular those limits imposed by Section 9(b)(3) which bars the Board from certifying a union to represent statutory guards if it is affiliated directly or indirectly with a non-guard union. The Employer also points to the provisions of the FLRA prohibiting employees engaged in administering any provision of law relating to labor-management relations from being represented by a labor organization which represents other individuals to whom such provision applies or which is affiliated directly or indirectly with an organization which represents individuals to whom such provision provides.

employer, an enterprise engaged in the business of issuing casualty insurance policies. A regular and frequent occurrence in the course of this enterprise was settling and litigating claims arising under the insurance. The Employer posited several arguments as to why the attorneys should not be included in any unit, among them that membership in a labor organization would violate the canons of ethics. The Employer pointed to the fact that attorneys were "officers of the court" and holders of a "public trust." The Board rejected these arguments: "In our opinion the fact that the attorneys sought herein are, like all attorneys, officers of the court and fiduciaries, is not a sufficient basis for denying them the benefits of the Act. Attorneys, in general, including the Employer's attorneys, are subject to various rules of conduct prescribed by the courts . . . In this situation, the statutory objectives, including the right to collective bargaining, may be achieved despite any limitations imposed upon attorneys by virtue of their status as officers of the court." 75 NLRB at 1136-37.

In *Foley Hoag and Eliot*, 229 NLRB 456, 458 (1977), which changed long-standing policy and asserted jurisdiction over law firms generally, the Board also made clear that in doing so it had fully considered the possibility of ethical conflicts which might arise when attorneys, or other employees of a law firm, are union members as well:

> Chairman Fanning and Members Jenkins and Penello are aware, no less than Members Murphy and Walther, of the privileged and confidential relationship which exists between an attorney and his or her client but would not, based on the mere speculation that in certain unusual situations self-organization of a law firm's staff employees may in some way conflict with that relationship, treat law firm employees differently than they would treat any other group of employees

covered under the National Labor Relations Act.

229 NLRB at 458 n.12. [12]

As noted above, the Employer contends that due to the particular nature of its enterprise, an exception to the general rule is warranted. In *Stroock & Stroock & Levan*, 253 NLRB 447 (1980), the employer therein contended that, because of its active practice in labor relations matters, and other corporate and commercial areas which encompassed labor considerations, an exemption under the rule of *Foley, Hoag & Eliot* was appropriate. Specifically, the employer argued that representation of its clerical and support staff by the petitioner would inevitably lead to damaging leaks of client confidences and thereby have a detrimental effect on its practice. The Board found that the Employer had not met its burden to justify departure from "the general principle that law firms' employees will not be treated differently from other groups of employees." 253 NLRB at 449. An additional argument made in that case, similar to one raised herein, is that the petitioner in question was unsuited to represent its employees due to its affiliation with an international union of general jurisdiction. This argument was rejected by the Board. Id.

The Board has had occasion to examine the areas of potential conflict between union membership and the fiduciary and other duties owed to

[12] Contrary to the Employer's suggestion, the Board did not mandate a "case by case" approach with respect to the employees of law firms other than the sort that would be appropriate in any other situation involving statutory employees. Members Murphy and Walther advocated a "case by case" approach in determining appropriate bargaining units insofar as they took the position that under certain circumstances attorneys and their employees could be deemed to be acting as "confidential employees," because they had a role in formulating the labor relations policies of their clients. The Board subsequently held that employees of law firms were not "confidential employees" on this basis. See *Kleinberg, Kaplan, Wolff, Cohen & Burrows, P.C.,* 253 NLRB 450 (1980).

employers and their clients in other contexts, as well. For example, in *Dun & Bradstreet*, 240 NLRB 162 (1979), the petitioner sought to represent credit reporters. The employer argued that union representation would involve its reporters in an irreconcilable conflict of interest and division of loyalties thereby compromising the confidentiality of information and sources, an absolute prerequisite to its business. The employer argued that, should its employees be accorded representational rights, its ability to assure the confidentiality of the information it collected would be diminished, and there would be a corresponding decrease in the number of firms willing to provide such information, for fear that such information would fall into the hands of a union. The Board rejected these arguments, enunciating the principle that "union membership is not incompatible with an employee's duty of loyalty owed to his or her employer, even when the duty involves a responsibility to maintain confidentiality." 240 NLRB at 162 (citing *Foley, Hoag & Eliot*, supra.)

In the instant case, the Employer has failed to present evidence of an actual conflict between the Petitioner and any of its clients. Contrary to the Employer's assertions, the provisions of the UAW Constitution fail to establish any specific, overriding obligation to support the activities of any other local union, such that members of the Petitioner would be obliged to take positions contrary to the interests of their clients, their employer, the Lawyer's Code of Professional Responsibility or their ethical duties generally to maintain good standing in the Union. Conversely, the Employer has pointed to no specific constitutional obligation on the part of the Petitioner that would compromise its

ability to represent the interests of the employees in the unit. There is no evidence that the UAW could compel any attorney member to take a specific position with respect to the representation of any of his or her clients, or that it ever has. The arguments which have been presented relating to the possibility for potential conflicts between the Employer's clients and UAW affiliates are, at best, speculative and not grounded in any current situation faced by either the Petitioner or the Employer. In this regard, they can hardly be said to constitute a "clear and present" danger to the collective-bargaining process. Any attorney may, from time to time, find that his or her professional and ethical responsibilities are in conflict, or potential conflict, with that attorney's personal or pecuniary interests. Similarly, it is not uncommon for attorneys to be faced with situations where their clients are in conflict with either each other or other clients of their employer. It is up to those attorneys, and their employers, to make decisions regarding disclosure and other matters related to client representation consistent with their fiduciary duties, their duties as officers of the court and the requirements of the Lawyer's Code of Professional Responsibility. As is apparent from the foregoing, the Board has held that the neither the anticipation of future possible conflicts of interest or the argument that union representation might lead to a breach of fiduciary or other duties is a sufficient basis on which to deny statutory employees their Section 7 rights.

Thus, I cannot conclude that the record supports a departure from the general rule that employees of law firms are entitled to be treated as any other group of employees covered under the National Labor Relations Act and the

"strong public policy favoring the free choice of a bargaining agent by employees." *Garrison Nursing Home*, supra. Any potential for conflict of interest or compromise of professional ethics inherent in union membership can be considered by employees as they decide to vote for or against union representation. As the Board has held: "[w]e find that the employees are in the best position to decide if representation by the Petitioner will serve their interests and will make that decision by casing their ballots for or against the Petitioner in the representation election." *CMT, Inc.*, 333 NLRB No. 151 (2001). For the foregoing reasons, I do not find that the record supports a determination that the Employer has met its burden of establishing that the Petitioner should be disqualified from representing the employees herein. Thus, a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

5. The Petition seeks an election in a unit of comprised of: all full-time and regular part-time employees, including attorneys, secretaries, legal assistants, receptionists and bookkeepers employed by the employer, excluding all other employees, including partners of the firm and attorneys of counsel to the firm, guards and supervisors within the meaning of the Act. Although the parties agree that the petitioned-for unit is appropriate for the purposes of collective bargaining, they also additionally concur that the attorneys in the petitioned for unit are professional employees. Thus, as professional employees, the attorneys should be given an opportunity to vote on whether they wish to be included in the

petitioned-for unit, or wish to be represented in a separate unit. In light of the foregoing, I therefore find that the following constitutes units that are appropriate for the purposes of collective bargaining:

UNIT A (Professional Unit)

Included: All full-time and regular part-time attorneys employed by the Employer.

Excluded: All non-professional employees set forth in Unit B below, and all other employees, including partners of the firm and attorneys of counsel to the firm, guards and supervisors within the meaning of the Act.

UNIT B (Non-Professional Unit)

Included: All full-time and regular part-time employees, including secretaries, legal assistants, receptionists and bookkeepers employed by the Employer.

Excluded: All professional employees as set forth in Unit A above and all other employees, including partners of the firm and attorneys of counsel to the firm, guards and supervisors within the meaning of the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director, Region 2, among the employees in the unit found appropriate at the time [13] and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations.[14] Eligible to vote are those in the unit who were

[13] Pursuant to Section 102.21(d) of the Board's Statement of Procedure, absent a waiver, an election will normally be scheduled for a date or dates between the 25th and 30th day after the date of this Decision.

[14] Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer "at least three full working days prior to 12:01am on the day of the election." Section 103.20(a) of the Board's Rules. In addition, please be advised that the Board has held Section 103.20 of the Board's Rules, requires that the Employer notify the Regional Office at least

employed at the payroll period ending immediately preceding the date of this Decision, including employees who did not work during the period because they were ill, on vacation or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike, who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States who are in the unit may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[15]

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five full working days prior to 12:01am of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).

[15] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which my be used to communicate with them. *North Macon Health Care Facility,* 315 NLRB 359 (1994); *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *NLRB v. Wyman Gordon Company,* 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 3 copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Regional Director, Region 2, who shall make a list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at the address below, on **June 27, 2003.** No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Those employees who are in Unit A (Professional Unit) will be furnished a ballot containing the following questions:

> Do you wish to be included in the same unit as non-professional employees for the purposes of collective bargaining? ("Yes" or "No")
>
> Do you wish to be represented for the purposes of collective bargaining by the National Organization of Legal Services Workers (NOLSW), UAW, Local 2320, AFL-CIO?

Those employees who are in Unit B (Non-Professional Unit) will be furnished a ballot containing the following question:

> Do you wish to be represented for the purposes of collective bargaining by the National Organization of Legal Services Workers (NOLSW), UAW, Local 2320, AFL-CIO?

If a majority of employees in Unit A vote "Yes" to the first question, indicating a choice to be included in the overall unit with the non-professional employees, the professional employees will be so included. The ballots of the professional employees will then be counted with the ballots of the non-professional voting group to decide the representative of the entire unit. If, however, a majority of the professional employees in Unit A do not vote for inclusion, these employees will not be included in the non-professional employee

unit and their votes on the second question will be separately counted to decide whether they wish to be represented in a professional unit. [16]

Dated at New York, New York
June 20, 2003

(s) *Celeste J. Mattina*
Celeste J. Mattina
Regional Director, Region 2
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10278

Code: 339-7575
385-5050
355-2260

[16] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. This request must be received by the Board in Washington by no later than **July 7, 2003.**